

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY L. SMALL,)	C 07-5133 MJJ (PR)
)	
Petitioner,)	ORDER OF DISMISSAL WITH
)	LEAVE TO AMEND;
vs.)	GRANTING LEAVE TO
)	PROCEED IN FORMA
M.S. EVANS,)	PAUPERIS
)	
Respondent.)	
_____)	(Docket No. 4)

Petitioner, a California prisoner, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254.

BACKGROUND

In 2002, petitioner was convicted of multiple offenses and sentence enhancements in Santa Clara County Superior Court. The California Court of Appeal affirmed the conviction and sentence, and the Supreme Court of California denied the petition for review.

DISCUSSION

A. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

1 B. Legal Claims

2 Petitioner makes the following claims: (1) "Court Error [sic]"; (2) "Sufficiency of
3 Evidence"; and (3) "Sufficiency of Evidence." These claims are not cognizable because
4 petitioner does not allege any violation of federal law, as is required for federal habeas relief. Rose
5 v. Hodges, 423 U.S. 19, 21 (1975). With each of his claims, petitioner references an
6 "attached State Writ of Habeas Corpus", but no briefs, petitions, writs or any other
7 documentation is attached to the petition. Consequently, petitioner has not adequately
8 explained the basis for his claims, nor has he set forth the federal law he claims has been
9 violated. Petitioner will be given leave to amend to explain the basis for his claims and to
10 allege, if he can do so in good faith, a basis in federal law for these claims. The court
11 cautions that if petitioner chooses to so amend, the court will not be able to consider the
12 claims unless petitioner has previously presented the *federal basis* for the claims to the
13 California Supreme Court; otherwise, the claims have not been properly exhausted.

14 **CONCLUSION**

15 For the foregoing reasons, the Court hereby orders:

16 1. The petition is DISMISSED with leave to amend. Within **30 days** of the date
17 this order is filed, petitioner must amend this petition as to correct the deficiencies noted
18 above in these claims. Petitioner's amended petition shall be filed on the Court's form for
19 habeas petitions, and the exhibits shall be clearly labeled and numbered in an orderly manner.
20 See Fed. R. Civ. P. 8(e) (all pleadings must be simple, concise and direct). The amended
21 petition must include the caption and civil case number used in this order (No. C 06-2494
22 MJJ (PR)) and the words AMENDED PETITION on the first page. Petitioner must include
23 in the amended petition all the claims he wishes to present; he may not incorporate material
24 from the original petition by reference.

25 2. **Failure to timely file an amended petition in conformity with this order**
26 **shall result in the dismissal of this action.**

27 3. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
28 Court and respondent informed of any change of address and must comply with the Court's


1 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
2 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) or Local Rule 3-11.

3 The application to proceed in forma pauperis is GRANTED in light of petitioner's
4 lack of funds.

5 This order terminates docket number 4.

6 IT IS SO ORDERED.

7
8 DATED: 10/25/07


MARTIN J. JENKINS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOHNNY L. SMALL,
Plaintiff,

Case Number: CV07-05133 MJJ

CERTIFICATE OF SERVICE

v.


MS. EVANS et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 26, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Johnny L. Small J - 44318
P.O. Box. 1050
Soledad, CA 93960-1050

Dated: October 26, 2007


Richard W. Wieking, Clerk
By: R.B. Espinosa, Deputy Clerk